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NO. _____

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM 1983

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner

vs.

JAMES G. WATT, et al., and WALKER RIVER
PAIUTE TRIBE OF NEVADA,
Respondents

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

REPRODUCTION OF PORTIONS OF APPENDIX TO PETITION FOR WRIT OF CERTIORARI

FOLEY, MC INTOSH & FOLEY
PROFESSIONAL CORPORATION
By ROBERT J. FOLEY
(counsel for service)
By WILLIAM R. FOLEY
1225 Solano Avenue
Albany, CA 94706
Telephone (415) 524-4123

ECHEVERRIA AND OSBORNE,
CHARTERED
By PETER ECHEVERRIA
By NATHAN M. JENKINS
555 South Center Street
Reno, Nevada 89501

Attorneys for Petitioner

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APPENDIX A

1. Decision of the United States Court of Appeals, Ninth Circuit, decided 1 March 1983, published at 700 F.2d 550 (1983).

SOUTHERN PACIFIC TRANSPORTATION COMPANY
Plaintiff-Appellee,

v.

James G. WATT, Secretary of the Interior, et al., Defendant-Appellant,

and

Walker River Paiute Tribe of Nevada
Defendant-Intervenor-Appellant.

Nos. 80-4505, 80-4506.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Jan. 14, 1982.

Decided March 1, 1983.

Railroad sought review of administrative denial of its application for railroad, telephone and telegraph right-of-way across tribal lands for lack of tribal consent to right-of-way. The United States District Court for the District of Nevada, Bruce R. Thompson, J., granted summary judgment for railroad,

and tribe and Secretary of the Interior appealed. The Court of Appeals, Canby, Circuit Judge, held that Secretary acted within his power in requiring by regulation that tribal consent be obtained for acquisition of right-of-way.

Reversed and remanded.

1. Indians - 10

Statute which grants right-of-way for railway, telegraph and telephone line through any Indian reservation to any railroad which complies with applicable statutory provisions and rules and regulations was intended fully to protect Indian interests and must be liberally construed in favor of Indians. 25 U.S.C.A. §§312-318.

2. Indians - 15(2)

Under statute which grants right-of-way for any railway, telegraph and

telephone line through any Indian reservation to any railroad which complies with statutory provisions and rules and regulations, Secretary of the Interior acted within his power in requiring by regulation that tribal consent be obtained for acquisition of right-of-way by railroad. 25 U.S.C.A. §§312-318.

3. Indians - 10

Statute which grants right-of-way for railway, telegraph and telephone lines through any Indian reservation to any railroad that complies with statutory provisions and rules and regulations does not constitute grant to railroad companies of power of eminent domain since statute contains no express grant of power of eminent domain nor is it necessary to imply

such a grant to make statute effective. 25 U.S.C.A. §§312-318.

4. Public Lands - 71

Once grant in praesenti, which was judicially created to establish priorities among rival private claimants to federal lands, is approved by designated government official, it relates back to date grantee commenced proceedings to obtain title and cuts off all claimants whose rights were initiated later but relation back of title applies only as against other intervening claimants and, as against United States, no vested right arises until requirements are met, and grant has been approved by designated official.

5. Constitutional Law - 62(5)

Indians - 15(1)

Congress may vest in administrative official the authority to establish discretionary conditions with which prospective grantees must comply in order to make grants effective and trigger relation back of title, and congress did exactly that in statute which grants right-of-way for railway, telegraph and telephone line through any Indian reservation to any railroad which complies with statutory provisions and rules and regulations promulgated thereunder. U.S.C.A. §§312-318.

6. Constitutional Law - 63(1)

Subdelegation of administrative authority to an Indian tribe is analogous to subdelegation to state or local government, which is not per se

improper, and such a subdelegation need not rest on express statutory authority.

7. Indians - 15(2)

Secretary of the Interior's regulation requiring that tribal consent be obtained for acquisition of right-of-way was not abdication of Secretary's power to administer statute which grants right-of-way for railway, telegraph and telephone line through any Indian reservation to any railroad that complies with statutory provisions and rules and regulations prescribed thereunder but, rather, constituted effort by Secretary to incorporate into decision-making process the wishes of a body with independent authority over affected lands, and

thus redelegation was proper. 25 U.S.C.A. §§312-318.

Laura Frossard, Atty., Dept. of Justice, Washington, D.C., Yvonne T. Knight, Native Americans Rights Fund, Boulder, Colo., for Watt.

Nathan Jenkins, Reno, Nev., William R. Foley, Robert J. Foley, Foley, McIntosh & Foley, Albany, Cal., for Southern Pacific.

James McCartney, Houston, Tex., for amicus curiae Transwestern Pipeline Co.

Appeal from the United States District Court for the District of Nevada.

Before FLETCHER, POOLE and CANBY, Circuit Judges.

CANBY, Circuit Judge:

The Walker River Paiute Tribe of Nevada (Tribe) and the Secretary of the Interior (Secretary) appeal from the district court's grant of summary judgment in favor of Southern Pacific Transportation Company (Southern Pacific). The district court held that tribal consent is not a condition precedent to the filing and processing of an application for a right-of-way across tribal lands under the Act of March 2, 1899, ch. 374, 30 Stat. 990 (codified at, 25 U.S.C. §§312-318 (1976) (1899 Act or Act). We disagree and reverse the grant of summary judgment in favor of Southern Pacific.

I. Facts

The relevant facts are undisputed. Since 1882 Southern Pacific and its predecessors have operated a railway

and adjoining telephone and telegraph lines over lands within the Walker River Indian Reservation. In 1976, this court held that Southern Pacific "does not have and has never had a valid right-of-way across lands within the original 1874 executive order boundaries of the Walker River Reservation except through the lands ceded by the Tribe to the United States in 1906". United States v. Southern Pacific Transpor., 543 F.2d 676, 699 (9th Cir. 1976)(Southern Pacific I). As a result, on April 28, 1977, Southern Pacific filed an application with the Western Nevada Agency of the Bureau of Indian Affairs for a railroad, telephone and telegraph right-of-way through 10.89 miles of tribal lands within the Walker River Indian Reservation.

Southern Pacific sought the right-of-way under the provisions of the 1899 Act. On May 4, 1977, the Agency Superintendent rejected the application without filing it, because it did not include evidence that the Tribe had consented to the right-of-way. Southern Pacific appealed the Agency Superintendent's decision within the agency, and the decision was upheld at all administrative levels.

Southern Pacific sought review of the agency action in federal district court. The Tribe intervened as a party-defendant. After cross motions for summary judgment, the district court entered judgment in favor of Southern Pacific. This appeal followed.

II. Discussion

We must determine whether Congress has authorized the Secretary to impose

a condition of tribal consent on an application for a right-of-way under the 1899 Act. The Secretary and the Tribe contend that the 1899 Act itself vests in the Secretary the authority to impose conditions, including tribal consent, on railroad rights-of-way across Indian tribal lands. They argue that the district court erred in characterizing the 1899 Act as an eminent domain statute and a grant in praesenti. The Tribe argues in the alternative that even if the 1899 Act is a grant in praesenti, that fact would not preclude the Secretary from establishing conditions with which prospective grantees must comply before a grant becomes effective. We conclude that the 1899 Act is not an eminent domain statute. We further

conclude that the 1899 Act - whether a grant in praesenti or not - authorizes the Secretary to establish, by regulation, grant preconditions, including one of tribal consent. The Secretary has exercised that authority and promulgated a regulation providing that "[n]o right-of-way shall be granted over and across any tribal land . . . without the prior consent of the tribe." 25 C.F.R. §161.3(a) (1981). We reject Southern Pacific's contention that the regulation constitutes an unlawful redelegation of the Secretary's authority.

[1] In interpreting the 1899 Act, we are guided by our earlier determination in this case that the Act was intended fully to protect Indian interests. Southern Pacific I,

543 F.2d at 692; see H.R.Rep. No. 1896, 55th Cong., 3d Sess. 2 (1899). It must therefore be liberally construed in favor of the Indians. Id.; see Bryan v. Itasca County, 426 U.S. 373, 392, 96 S.Ct. 2102, 2112, 48 L.Ed.2d 710 (1976). We must also bear in mind that the construction of a statute rendered by the agency charged with its administration is ordinarily entitled to substantial deference. United States v. Rutherford, 442 U.S. 544, 553, 99 S.Ct. 2470, 2475, 61 L.Ed.2d 68 (1979); Udall v. Tallman, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965); Central Lincoln Peoples' Utility Dist. v. Johnson, 673 F.2d 1076, 1078 (9th Cir.1982); Adams v. Howerton, 673 F.2d 1036, 1040 (9th Cir.), cert. denied, _____ U.S. ____,

102 S.Ct. 3494, 73 L.Ed.2d 1373 (1982). Our review is limited to determining whether the Secretary's interpretation is reasonable. Central Lincoln, 673 F.2d at 1078; Columbia Basin Land Protection Assoc'n v. Schlesinger, 643 F.2d 585, 600 (9th Cir.1981).

A. The 1899 Act

[2] The 1899 Act provides in part:

> A right of way for a railway, telegraph and telephone line through any Indian reservation . . . is granted to any railroad company organized under the laws of the United States, or of any State or Territory, which shall comply with the provisions of sections 312-318 of [the 1899 Act] and such rules and regulations as may be prescribed thereunder. 15 U.S.C. §312

(1976) Provisos follow that establish certain conditions that the Secretary must assure have been fulfilled. The district court held that the 1899 Act grants to a railroad the power of eminent domain to condemn rights-of-way through Indian reservations and that "[t]he concept of tribal consent as a pre-condition to the grant of a right-of-way is the very antihesis of the exercise of the power of eminent domain." The district court also held the 1899 Act to be a grant in praesenti subject to the performance of conditions precedent and conditions subsequent. Therefore, in the district court's view, the Act does not vest in the Secretary authority to establish grant preconditions beyond those contained in the statute but rather expressly

specifies the conditions the Secretary must find to be satisfied prior to approving an application. The Secretary and the Tribe challenge the district court's determination that the 1899 Act is a grant of the power of eminent domain and a grant in praesenti. They argue that Section 312 of the Act delegates to the Secretary authority to promulgate legislative rules and, thereby, the authority to establish grant preconditions by regulation. We conclude that the interpretation advanced by the Secretary and the Tribe is both reasonable and in accord with our obligation to construe the 1899 Act liberally in the Tribe's favor. Having concluded that the interpretation advanced by the Secretary of Interior, the head of the agency

charged with administration of the 1899 Act, is reasonable, we need not inquire further into the meaning of the provisions of the Act. "[W]e need not find that [the Secretary's] construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." Udall v. Tallman, supra, 380 U.S. at 16, 85 S.Ct. at 801, quoting Unemployment Compensation Comm'n of Alaska v. Aragon, 329 U.S. 143, 67 S.Ct. 245, 91 L.Ed 136 (1946). It is enough that the Secretary's interpretation is reasonable, and there are several grounds for concluding that it is.

The plain language of the Act supports the interpretation of the

Secretary and the Tribe. Section 1 provides that a right-of-way "is granted" to a railroad company that complies "with the provisions of sections 312-318 of this title [the 1899 Act] and such rules and regulations as may be prescribed thereunder . . . ." 25 U.S.C. §312 (1976) (emphasis added). Thus, section 1 may be read to establish two sources of conditions precedent: the statutory provisions and the Secretary's regulations. That reading of section 1 is reinforced by the fact that section 7 directs the Secretary to "make all needful rules and regulations, not inconsistent with sections 312-318 of this title, for the proper execution and carrying into effect of all the provisions of said sections." Id. at §317. The grant of

rule-making authority in section 1 would be superfluous if it did not confer authority to promulgate requirements, beyond those specified in the Act. Furthermore, the use of the phrase "rules and regulations, not inconsistent with sections 312-318 of this title" (emphasis added) in section 7 (§317) rather than such a phrase as "rules and regulations, in furtherance of the provision of sections 312-318 of this title" supports a broad interpretation of the grant of rule-making authority.

Nothing in the legislative history of the 1899 Act suggests that the interpretation urged by the Secretary and the Tribe is unreasonable. That history is silent on the question of the scope of the authority vested in

the Secretary by the Act. See H.R.Rep. 1896, 55th Cong. 3d Sess. 1-2 (1899); 32 Cong. Rec. 1753-55, 1849, 2041-42, 2471-72 (1899).

The construction we approve here is also consistent with the 1948 General Rights-of-Way Act, Pub.L. No. 80-407, 62 Stat. 17 (codified in 25 U.S.C. §§323-328 (1976) (1948 Act), which provides that "[n]o grant of a right-of-way over and across any lands belonging to a tribe organized under [the Indian Reorganization Act of 1934][1] . . . shall be made without the consent of the proper tribal officials." 25 U.S.C. §324 (1976). We recognize

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1. The Walker River Paiute Tribe of Nevada is the governing body of the Walker River Indian Reservation. The Tribe is organized pursuant to section 16 of the Indian Reorganization Act, Pub.L. No. 73-383, 48 Stat. 984, 987 (1934) (codified in 25 U.S.C. §476 (1976).

that interpretation of the 1899 Act must rest primarily on its own language and legislative history. Nevertheless, the 1899 Act and the 1948 Act both pertain to rights-of-way across Indian lands and share a common purpose: the preservation and protection of Indian interests. The Supreme Court has expressly approved the construction of statutes affecting reservation Indians in light of intervening legislation. Bryan v. Itasca County, supra, 426 U.S. at 386, 96 S.Ct. at 2109; see Moe v. Salish & Kootenai Tribes, 425 U.S. 463, 472-75, 96 S.Ct. 1634, 1640-42, 48 L.Ed.2d 96 (1976). Furthermore, the legislative history of the 1948 Act suggests that the drafters of that Act believed that, at least after adoption of the 1948 Act, no right-of-

way across lands of a tribe organized under the 1934 Act could be granted without tribal consent. See S.Rep. No. 823, 80th Cong., 2d Sess., reprinted in [1948] U.S. Code Cong. & Ad.News 1033, 1036. See also Escondido Mutual Water Co. v. Federal Energy Regulatory Comm'n, 692 F.2d 1223, 1232 (9th Cir. 1982).

B. Grant of Eminent Domain Power

[3] In reaching the conclusion that the 1899 Act vests in the Secretary authority to require tribal consent priot to processing of a right-of-way application, we necessarily reject characterization of the 1899 Act as a grant to railroad companies of the power of eminent domain. "Eminent domain is the power of the sovereign

to take property for public use without the owner's consent." 1. J. Sackman, Nichols' The Law of Eminent Domain, §1.11, at 1-7 (3d ed. 1981). It is well settled that the power of eminent domain may be delegated by Congress to a private corporation. Custiss v. Georgetown & Alexandria Turnpike Co., 10 U.S. (6 Cranch) 232, 3 L.Ed. 209 (1810)(Marshall, C.J.); 1 Nichols, supra at §3.23, at 3-212. A grant of the power, however, must be conferred "in express terms or by necessary implication." Western Union Tel. Co. v. Penn R.R. Co., 195 U.S. 540, 564-69, 25 S.Ct. 133, 49 L.Ed. 312 (1904); 1 Nichols, supra, at §3.21[4], at 3-60; accord, 3 C. Sands, Sutherland Statutory Construction §64.06, at 128 (4th ed. 1974).

Comparison of the 1899 Act with contemporaneous acts held to be eminent domain statutes reveals that the 1899 Act does not contain the language characteristic of a grant of the power of eminent domain. The Act of February 18, 1888, ch. 13, 25 Stat. 35 (held to be a grant of the power of eminent domain in Noble v. Oklahoma City, 297 U.S. 481, 490 56 S.Ct. 562, 566, 80 L.Ed. 816 (1936), and the Act of March 3, 1899, ch. 453, 30 Stat. 1368 (held to be a grant of the power of eminent domain in United States v. Ft. Smith & W.R. Co., 195 F.211, 212 (8th Cir.1912), both provide that a named railroad is "invested and empowered with the right of locating, constructing, owning, equipping, operating, using, and maintaining a railway" and "is author-

ized to take and use" a right-of-way for railway purposes and "to take and use" land for station purposes. Nowhere in the 1899 Act is there language conferring on a railroad the right to condemn or the right to take and use. The operative language of the 1899 Act is the phrase "is granted" which imports not a delegation of the power of eminent domain but rather a direct conveyance, conditioned or not, by Congress or an administrative agency. Thus, the 1899 Act contains no express grant of the power of eminent domain; nor is it necessary to imply such a grant to make the Act effective.

We therefore conclude that the district court erred in holding that

the 1899 Act was a grant of the power of eminent domain.[2]

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2. In so holding, we reject two statements of other courts of appeal characterizing the 1899 Act as a grant of eminent domain. See United States v. Ft. Smith & W.R. Co., 195 F.211, 214 (8th Cir.1912); Clarke v. Boysen, 39 F.2d 800, 814 (10th Cir.), cert. denied, 282 U.S. 869, 51 S.Ct. 75, 75 L.Ed. 768 (1930). Those statements, relied on by the district court here, were neither well considered nor necessary to the decisions in which they appeared. Ft. Smith arose under a different statute (also passed in 1899(, and Clarke, in its relevant portions, concerned the question whether the 1899 Act applied to reservation lands previously ceded to the United States.

   The district court in the present case also relied on provisions for determining compensation for rights-of-way in the absence of consent, in section 3 of the 1899 Act, 25 U.S.C. §314 (1976), as well as a footnote in Cohen's Handbook of Indian Law referring to the right of railway companies to condemn Indian land. F. Cohen, Handbook of Federal Indian Law 95 n. 76 (1942). Both of these references are to acquisition of rights-of-way over individually allotted lands, not tribal lands such as those involved in the present dispute. The two are not inevitably treated the same. See Yellowfish v. Stillwater, 691 F.2d 926 (10th Cir. 1982).

C. Grant In Praesenti

[4] The district court also held that the 1899 Act was a grant in praesenti. We find it unnecessary to resolve that question.[3] The doctrine of in praesenti

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3. We disagree with the district court's reading of our prior decision, Southern Pacific I, supra, as "impliedly recognizing that the [1899] Act is a grant in praesenti of a right-of-way . . . ." In Southern Pacific I we did not reach the question whether the 1899 Act is a grant in praesenti. We did point out that the granting clause of the 1899 Act differed significantly from that of the 1875 Act, a statute previously held to be a grant in praesenti. 543 F.2d at 691. We further noted that to qualify as a grantee under the 1899 Act, a railroad must comply with requirements not found in the 1875 Act. Id. We then held that Southern Pacific's predecessors did not comply with the compensation requirement of the 1899 Act and, therefore, failed to acquire a right-of-way under that Act. Id. at 692-93. To reach that result in Southern Pacific I, it was unnecessary for us to decide whether the additional requirements contained in the 1899 Act were consistent with the characteristics of a grant in praesenti.

grants was judicially created to establish priorities among rival private claimants to federal lands. A grant in praesenti "imports the transfer . . . of a present interest in the lands designated" by the act. Van Wyck v. Knevals, 106 U.S. 360, 365, 1 S.Ct. 336, 337, 27 L.Ed. 201 (1882). The words "is hereby granted" are characteristic of an in praesenti grant. Noble v. Oklahoma City, supra, 297 U.S. at 490-91, 56 S.Ct. at 566. Once the grant is approved by the designated government official, it "relates back to the initiatory right [the date the grantee commenced proceedings to obtain title], and cuts off all claimants whose rights were initiated later." Stalker v. Oregon Shortline R.R., 225 U.S. 142, 149, 32 S.Ct. 636, 638, 56

L.Ed. 1027 (1912); accord, Van Wyck v. Knevals, 106 U.S. at 365, 1 S.Ct. at 337. The relation back of title applies only as against other intervening claimants. As against the grantor United States, no vested right arises until the requirements are met and the grant has been approved by the designated official. Stalker v.Oregon Shortline R.R., 225 U.S. at 149, 32 S.Ct. at 638; Shepley v. Cowan, 91 U.S. 330, 338, 23 L.Ed. 424 (1876).

[5] Nothing in this scheme of in praesenti grants, nor in its purpose of protecting grantees against intervening private claims, necessarily limits the right of the grantor United States to condition the grant. It is true that in the typical in praesenti grant, the determination of the Secre-

tary that the grantee has complied with the conditions of the grant is a ministerial function. Neither authority nor logic requires that this be the case, however. We have been shown no sufficient reason to conclude that Congress is unable to vest in an administrative official the authority to establish discretionary conditions with which prospective grantees must comply in order to make the grants effective and trigger the relation back of title. Our examination of section 312 convinces us that Congress has done exactly that. Congress' action is effective whether or not the Act provides for grants in praesenti. That is all we need to decide about the meaning of the Act.

D. Redelegation of the Secretary's Authority.

Southern Pacific contends that if the 1899 Act is construed to authorize the Secretary to establish conditions precedent to the grant of a right-of-way under that Act, the Secretary, by requiring tribal consent under 25 C.F.R. §161.3(a)(1981), has improperly redelegated that decisional authority to the Indian tribes. We conclude that the challenged redelegation is permissible.

[6] Subdelegation of administrative authority to an Indian tribe is analogous to subdelegation to a state or local government. "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory

. . .; they are 'a separate people' possessing 'the power of regulating their internal and social relations . . . .'" United States v. Mazurie, 419 U.S. 544, 557, 95 S.Ct. 710, 717, 42 L.Ed.2d 706, 716-17 (1975) (citations omitted). Subdelegation of administrative authority to a sovereign entity is not per se improper. Id.; see United States v. Matherson, 367 F.Supp. 779, 781-83 (E.D.N.Y. 1973)(upholding regulation issued by Superintendent of Fire Island National Seashore requiring persons seeking to operate motor vehicles on certain national seashore lands to secure first a permit from the local municipality), aff'd mem., 493 F.2d 1399 (2d Cir. 1974). Nor must such a subdelegation rest on

express statutory authority. See Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111, 120-22, 67 S.Ct. 1129, 1134, 91 L.Ed. 1375 (1947); Tabor v. Joint Bd. for Enrollment of Actuaries, 566 F.2d 705, 708 n. 5 (D.Cir.1977).

[7] The regulation at issue is not an abdication of the Secretary's power to administer the 1899 Act but rather an effort by the Secretary to incorporate into the decision-making process the wishes of a body with independent authority over the affected lands. The regulation does not relinquish to a tribe the final authority to approve; it delegates a power to disapprove. Cf. United States v. Matherson, 367 F.Supp. at 783 (Superintendent retains ultimate authority to approve permit). Moreover,

while the local jurisdiction in Matherson had no source of power separate from the regulation to control the use of national seashore lands, a tribe has independent authority to regulate the use of its own lands. The Supreme Court has stated that the limitations on Congressional delegation of legislative power are "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter." United States v. Mazurie, 419 U.S. at 556-57, 95 S.Ct. at 717 (citation omitted). Applying that principle to the redelegation of legislative authority by an administrative body, we conclude that the redelegation embodies in 25 C.F.R. §161.3 is not improper.

III. Conclusion

The Secretary acted within his power in requiring by regulation that tribal consent be obtained for the acquisition of rights-of-way pursuant to the 1899 Act, 25 U.S.C. §312 (1976). The summary judgment in favor of Southern Pacific is reversed and the case is remanded to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED

APPENDIX B

2. Decision of the Assistant Secretary of the Interior for Indian Affairs, dated 19 June 1978.

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

June 19, 1978

CERTIFIED-RETURN RECEIPT REQUESTED

Echeverria & Osborne, Chartered
555 South Center Street
Reno, Nevada 89501

Mr. Larry W. Telford
One Market Plaza
San Francisco, California 94105

Gentlemen:

This is an appeal by the Southern Pacific Transportation Company, through its attorneys, from a decision of the Assistant Area Director of the Phoenix Area Office affirming the decision of the Superintendent, Western Nevada Agency, to reject for filing, Southern Pacific's application for a railroad right-of-way across tribal lands of the Walker River Reservation. A

request was made on behalf of the appellant that the matter be referred to an Administrative Law Judge to conduct an evidentiary hearing. This request has been taken into consideration and rejected. The decision is therefore based on the written briefs of the appellee and the appellant.

A review of the file indicates the following relevant facts. The Southern Pacific Transportation Company (hereinafter "appellant") filed an application on April 28, 1977, for a railroad, telephone and telegraph right-of-way under the Act of March 2, 1899 (25 U.S.C. §312, et seq.). The application is for a 60-foot width, 10.89 miles in length, across tribally-owned land. On May 4, 1977, the Agency Superintendent returned the

application as being incomplete without written evidence of tribal approval. He recommended, at that time, ". . . that negotiations between you and the tribe be finalized before approval action can be considered on your application."

On May 27, 1977, the Acting Superintendent sent appellant a second letter outlining the contents of a properly filed application. In so doing, the Acting Superintendent specified that the application should be submitted under the Act of February 5, 1948 (25 U.S.C. 323), and that, among other things, the application ". . . must have the tribe's concurrence in the form of a tribal resolution." The Superintendent also indicated that the application for telephone and

telegraph lines should be submitted separately.

On May 27, appellant filed an appeal with the Area Director. On December 12, 1977, the Assistant Area Director, acting on the advice of the Portland Regional Solicitor, affirmed the agency's decision to return the application. The Area Director concentrated on the issue of whether appellant needed to show evidence of tribal consent in presenting its application. In so doing, the Area Director stated that the Secretary has the authority to require appellant to apply under the 1948 Act, but regardless of which act applied, tribal consent is a matter of statutory law and congressional policy. Therefore, waiver of the consent requirement would constitute

an abuse of the Secretary's discretion. The current appeal is from the Area Director's decision.

In its argument, appellant has argued that it is entitled to file its application under the 1899 Act, and that requiring tribal consent is inconsistent with the terms of the 1899 Act. Appellant argues that the 1899 Act provides for an in praesenti grant and that requiring tribal consent cannot therefore be imposed afterwards as a condition of such a grant. Alternatively, the appellant argues that applying the 25 CFR 161.3 consent requirement to applications filed pursuant to the 1899 Act is a denial of due process because the regulations do not make it clear that 161.3 is a pertinent section, applicable to

applications under the 1899 Act. Finally, appellant has argued that given the history of the United States' actions toward appellant and its predecessor in interest, the Assistant Secretary should in this case exercise his discretion to waive the consent requirement. Alternatively, because of such behavior, the Assistant Secretary is estopped from applying the consent requirement.

Consent Requirement

We conclude that it is immaterial whether the subject application is filed pursuant to the 1948 or the 1899 Acts, since Congress has made it clear that the consent of tribes organized under the 1934 Indian Reorganization Act is essential before the United States can alienate interests in their

trust lands. The Walker River Tribe is an IRA tribe. This requirement flows from 25 U.S.C. §476, which guarantees IRA tribes the power to prevent the sale, disposition, lease or encumbrance of tribal lands, interest in lands, or other tribal assets without the consent of the tribe. In other words, the consent requirement is not, in our view, an attribute of the Secretary's power or discretion but is a statutory element of a tribe's sovereign power which the Secretary does not have the discretion to waive.

Indeed, the 1948 Right-of-Way Act specifically bars the Secretary's ability to abrogate a tribe's prerogative in such matters. "No grant of a right-of-way over and across any lands belonging to a tribe organized under

sections 461-473 and 474-479 of this title; . . . shall be made without the consent of the proper tribal officials." 25 U.S.C. §324. (See also 1948 U.S. Code Cong. Service, p. 1033).

That Congress fully understood and intended such a policy is clear from the 1969 report of the House Committee on Government Operations (H. Rep. 91-78, 91st Cong. 1st Sess.), concerning this Department's revised right-of-way regulations which would have allowed the Secretary to waive the consent requirement in the case of non-IRA tribes.

> "We believe the Department's obligation to protect the rights of the Indian tribes should be concluded in regulations which clearly and emphatically preclude

any possible misuse of right-of-way grants to alienate Indian land without the consent of the Indians or to evade the maximum terms of years fixed in the acts of Congress authorizing land leasing.

For all of these reasons, it would appear best to retain the present Section 161.3 without any change, and to announce unambiguously that your Department intends to observe its own regulations."

(Letter to the Secretary of the Interior from Chairman, Natural Resources and Power Subcommittee, February 16, 1968.)

Appellant argues that since 25 U.S.C. §326 preserves the Secretary's authority under prior right-of-way statutes, the Secretary has continuing

authority under the 1899 Act to grant rights-of-way without regard to the consent requirement of §324. We reject such an interpretation of §326. The legislative history states that the purpose of the §326 provision was to ". . . avoid any possible confusion which may arise, particularly in the period of transition from the old system to the new . . . ." That counters the inference that §326 was intended to maintain separate procedures immune from the consent requirement of the 1948 Act.

Also, §326 must be read together with other sections of the same Act. While §325 evidences Congress' awareness of continuing authority under other statutes to grant rights-of-way, §324 categorically and unequivocally states

that "no right-of-way" shall be granted without tribal consent. Thus, the language of §324 embraces rights-of-way granted under §326. Furthermore, the precise language of §326 creates an important distinction. It states that the Federal Water Power Act is neither repealed nor amended by the 1948 Act; but, it merely states that prior right-of-way statutes are not repealed. In other words, its imposition of the §324 consent requirement can be construed as a quasi-amendment of the 1899 Right-of-Way Act, such an amendment is not barred by §326. We do not think that either the language of §326, or its legislative history, warrant an abridgment of the application of §324 to all rights-of-way granted after 1948.

Due Process:

We also conclude that, contrary to appellant's assertions, 25 CFR 161.3 and 25 CFR 161.23 make it clear that tribal consent must be obtained before any right-of-way can be granted. Therefore, appellant is not denied procedural due process. 25 CFR 161.23, the section applying to applications filed under the 1899 Act, provides that such applications shall also be subject to " . . . other pertinent sections of this Part 161." Because the consent requirement in 161.3 is so all-inclusive, "(a" No right-of-way shall be granted over and across any tribal land . . .," we do not see any room for question but that such a requirement is pertinent. Also, 161.15, the provision concerning

action on applications, states that the grant of a right-of-way shall be evidenced in a conveyancing instrument which incorporates the conditions or restrictions set out in the required consent. Moreover, 161.14 requires that the consideration and damage deposit filed with the applications shall in no event be less than the amount specified in the consent. In other words, the consent requirement is pervasive in the Part 161 application scheme.

Estoppel

Finally, appellant argues that the Assistant Secretary ought to exercise his discretion to waive the consent requirement because of the Department's past approval of the right-of-way. They also argue that

the Secretary is estopped from applying it because of such past behavior. As already stated, the Secretary does not have discretion to waive the requirement. Under the 1934 and the 1948 Acts, such an action would, in our view, infringe upon tribal sovereignty.

Moreover, estoppel is not applicable to the situation at hand. The case of United States v. Wharton, 514 F.2d 406 (C.A. 9 1975), cited by appellants, concerned title to public lands. The lands involved here are not public but are held in trust for the tribe. Moreover, the Wharton decision placed emphasis on the facts that not applying estoppel would work a fundamental unfairness to the injured party but applying it against the United States would not unduly harm the public

interest. Such is not the case here. Requiring the appellant to acquire tribal consent to its right-of-way application will not cause fundamental unfairness, as the divesting of title to land would have in the Wharton case. Moreover, the public interest, namely the tribe's sovereignty and ability to control its lands, would be unduly harmed were the consent requirement dropped in favor of the appellant. The compensation figure is to be negotiated and stated in the tribal consent. The tribe is the direct beneficiary of such compensation. Appellant essentially asks us to shift the burden of past government actions to the tribe's profound disadvantage -the loss of control over their lands and the inability to participate in

the determination of how much they should be compensated for such use.

In addition, several cases cited in the Wharton decision indicate that courts are less likely to apply estoppel against the government in matters of legislative significance, as opposed to purely administrative matters (e.g., the interpretations of Department regulations). Shuster v. C.I.R.., 312 F.2d 311 (C.A. 9 1962). Appellant asks that estoppel be applied to prevent the federal statutory consent requirement from being applied to them. We do not see that past unauthorized Department approval of a right-of-way is adequate grounds for estopping the application a current federal requirement. Indeed, if estoppel did not bar the United States from obtain-

ing a federal appellate decision that appellant did not have a valid right-of-way and is a trespasser until such time as it acquires one, we see no basis for applying estoppel to prevent the Department from requiring an applicant to adhere to federal statutory standards in filing an application.

The Area Director's decision also discussed the requirement under the 1899 Act that any deposit tendered upon application to the Secretary must be for the amount determined by the Secretary to be correct. Also, the 1899 Act requires that the application stipulate that passenger terminals be provided. We think that these points can be worked out in conjuntion with the agency when appellant submits its amended right-of-way application.

It is our conclusion that the Assistant Secretary cannot grant a right-of-way across the lands of a tribe which is subject to the provisions of the Indian Reorganization Act, without written evidence in the application of tribal consent--whether such application be submitted under the 1948 or the 1899 Act.

Accordingly, the decision of the Assistant Area Director dated December 12, 1977, is hereby affirmed. This decision, having been made in the capacity of Assistant Secretary is final for the Department and not subject to the provisions of 25 CFR 2.19(c).

Sincerely,

/s/ Forrest J. Gerard

Assistant Secretary -

Indian Affairs

APPENDIX B

3. Summary Judgment, entered 14 August 1980, by the United States District Court, District of Nevada, to which is appended Order Granting Summary Judgment, entered 25 July 1980.

FILED
AUGUST 14, 1980

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

SOUTHERN PACIFIC TRANS-
PORTATION COMPANY,

Plaintiff, CIVIL NO.
R-78-0216 BRT

-vs-

CECIL D. ANDRUS, et al.,

Defendants.

and SUMMARY JUDGMENT

WALKER RIVER PAIUTE TRIBE
OF NEVADA,

Defendant-Intervenor./

Cross Motions for summary judgment have been filed herein by Plaintiff, SOUTHERN PACIFIC TRANSPORTATION COMPANY, and by Defendant, CECIL D. ANDRUS, the Secretary of the Interior (which Motion was joined in by Defendant-

Intervenor, the WALKER RIVER PAIUTE TRIBE OF NEVADA).

The Motions have been thoroughly and extensively briefed by the parties and all parties have participated in oral argument.

The Court having carefully considered the arguments and authorities submitted in support of, and in opposition to the Motions, and being fully advised in the matter, has heretofore denied the Motion for summary judgment filed by the Secretary of the Interior and joined in by Interventor, and has granted the Motion for Summary Judgment filed by Plaintiff. A copy of the ORDER GRANTING SUMMARY JUDGMENT is attached hereto and made a part hereof by this reference, which Order shall

constitute the Findings of Fact and Conclusions of Law herein.

Good cause therefor appearing, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. CECIL D. ANDRUS, the Secretary of the Interior shall, forthwith, cause to be filed and processed the application and supporting documents heretofore tendered by SOUTHERN PACIFIC TRANSPORTATION COMPANY to the Western Nevada Agency on or about the 28th of April, 1977, with regard to a Railroad right-of-way through Tribal lands within the Walker River Reservation.

2. The filing and processing of said application and the granting of said right-of-way shall be accomplished pursuant to the provisions of the Right-of-Way Statute of 1899 (Act of

March 2, 1899 Ch. 374, 25 U.S.C. §§312-318). Said filing, processing and granting shall not be conditioned upon the procurement of the consent of the WALKER RIVER PAIUTE TRIBE OF NEVADA.

DATED this 13 day of August 1980.

/s/ Bruce R. Thompson
U. S. DISTRICT JUDGE

PRESENTED BY:

/s/ Nathan M. Jenkins
NATHAN M. JENKINS

FILED
JULY 25, 1980

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Plaintiff,

Civil No. R-78-0216 BRT

vs.

CECIL D. ANDRUS, et al.,

Defendants.

and

WALKER RIVER PAIUTE TRIBE OF NEVADA,

Defendant-Intervenor./

ORDER GRANTING SUMMARY JUDGMENT

The facts of this case are related in the opinion of the Ninth Circuit Court of Appeals in United States v. Southern Pacific Transportation Company, 543 F.2d 676 (9th Cir. 1976).

Subsequent to that decision, Southern Pacific on April 28, 1977, tendered for filing with the Western Nevada Agency of the Bureau of Indian Affairs, an application for a railroad right-of-way through the Walker River Indian Reservation. The application was prepared in reliance upon the right-of-way statute of 1899. (Act of March 2, 1899 ch. 374, §1, 30 Stat. 990, 25 U.S.C. 312). A total of 50.47 miles of railroad line had been involved in the earlier action (supra). The decision of the court resulted in recognition of a valid right-of-way across 25.72 miles of ceded lands (543 F.2d at 697). The present case pertains to 10.89 miles of railroad line which traverse tribal lands, that is, un-allotted lands within the boundaries

of the Walker River Indian Reservation.

The Superintendent of the Western Nevada Agency refused to file the application and supporting documents. Two administrative appeals followed and the final agency action on June 19, 1978 affirmed the Superintendent. It was expressly held at all administrative levels that a resolution from the Walker River Tribe consenting to the grant of the requested right-of-way is an essential pre-condition to acceptance of the application for processing.

The Department's position is founded on two statutes postdating the Act of March 2, 1899. The first of these is the Indian Reorganization Act of 1934, and particularly Section 16

of the Act (25 U.S.C. 476), which provides, in part:

> "In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress. June 18, 1934, c. 576, §16, 48 Stat. 987."

Secondly, reliance is placed upon the General Rights of Way Act of 1948,

and particularly Section 2 (25 U.S.C. 324), which provides, in part:

> "No grant of a right-of-way over and across any lands belonging to a tribe organized under sections 461-473 and 474-479, of this title; section 473a of this title and sections 358a and 362 of Title 48; and sections 501-509 of this title, shall be made without the consent of the proper tribal officials."

Finally, the clincher is said to be a regulation promulgated by the Secretary pursuant to express grant of regulatory authority (25 U.S.C. 328). The regulation states (25 C.F.R. 161.3(a), (1978):

> "No right-of-way shall be granted over and across any tribal land, nor shall any permission to survey be issued with respect to any such lands, without the prior written consent of the tribe."

Primary emphasis is placed by the government on the 1948 Act and regulation and it is said, in substance, that pre-consent of tribal authority

is required for any grant of any right-of-way across tribal lands because the 1948 Act impliedly repeals the 1899 Act and, in any event, must be read in pari material [sic] with the 1899 Act because both deal with the same subject matter - rights-of-way across tribal lands. In parsing the 1948 Act, however, defendants ignore 25 U.S.C. 326 which says "... nor shall any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands be repealed." Surely, the 1899 Act is such statutory authority. By the same token, the defendants do not allude to 25 U.S.C. section 327 which provides for grant of rights-of-way for the use of the United States under sections 323-328 upon application by a

department or agency. Section 324 (supra) is the one that requires tribal consent, and section 328 is the one that authorizes regulations. Yet, I presume that none of us will live to see the day when the statute is construed to require tribal consent as a pre-condition to the acquisition by the United States of an essential easement for governmental purposes (the M-X missile system is a possible example). In fact, the legislative history of the 1948 Act (1948 U.S. Code. Cong. Service 1036) described 25 U.S.C. section 327 as follows: "Section 5 of the bill broadens existing powers of condemnation over individually owned Indian lands." The entire discussion of the 1948 Indian Rights of Way Act (commencing on page 1033 of the refer-

enced Congressional Service) emphasizes the intent to facilitate the procedures for obtaining rights-of-way. At no place is the purpose of granting to tribal authority a power of absolute veto even mentioned or suggested.

The foregoing leads us into a discussion of the 1899 Act (25 U.S.C. §§312-318). The full text is copied in the margin. First, we observe that that [sic] section 312 by its very language ("is granted to any railroad company") is a grant in praesenti subject to the performance of conditions precedent and conditions subsequent, as specified in the statutes.* Secondly, we note that the Act expressly applies

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* In this respect, section 312 is similar to 43 U.S.C. section 932 (now repealed), which has frequently been interpreted as a grant in praesenti.

to a grant of a right-of-way to a railroad which has already been constructed. And, most importantly, under section 312 the participation of the Secretary of the Interior in the proceedings is strictly circumscribed. He has no general discretion to deny an application but must merely be satisfied that the application is made in good faith and with intent and ability to construct said road, and must afford parties a right to object and grant them a hearing.

Section 314 of the Act requires payment of just compensation for the right-of-way and provides an administrative procedure (three appraisers) to determine just compensation, and provides for a trial de novo in a United States District Court "and the

judgment for damages rendered by the court shall be final and conclusive." Notably, the Congress did not provide for judicial review of the right of the railroad to obtain a right-of-way by compliance with the requirements of the 1899 Act.

The foregoing summary demonstrates, we think, that the 1899 Act in question grants to the railroad the power of eminent domain. The late, great Judge Orie L. Phillips, so held in Clarke v. Boysen, 39 F.2d 800 (10th Cir. 1930). The court said:

> "By the Act of March 2, 1899, Congress granted to railroad companies the power of eminent domain to take rights-of-way through Indian Lands, upon payment of just compensation therefor. United States v. Ft. Smith & W. R. Co. (C.C.A. 8) 195 F. 211, 212. By this Act, Congress recognized the necessity and the desire for

> the construction of railroads across Indian lands. When the United States and the Indians decided to throw open for location and settlement the land designated in the Act of March 3, 1905, the desirability of inviting and encouraging construction and operation of needed and convenient lines of railroad, through such lands, was even greater than before, because the construction of such railroads would enhance the value of such lands and make them more readily salable." . . . (Emphasis supplied)

The Eighth Circuit reached the same conclusion in United States v. Ft. Smith & W.R. Co., 195 Fed. 211 (8th Cir. 1912):

> "On March 2, 1899, the day before the passage of the act which has been recited, Congress granted to this and to other railroad companies similarly situated the power of eminent domain to take rights of way through any land held by any Indian tribe and through any Indian reservation in the territory, on condition that it should make compensation therefor to the

> Nation, to any occupant and to any allottee, for the damage resulting from the taking of the right of way and the construction of the railroad, and it prescribed the same method of fixing the amounts of damages in cases of disagreement specified in the Act of March 2, 1899 (chapter 374, 30 Stat. 990, §§1, 2)."

The interpretation in Cohen's, Handbook of Federal Indian Law (1958 ed.), page 95, footnote 76 concurs:

> "The right of eminent domain may be exercised by the Federal Government over land held by an Indian nation in fee simple under patent from the United States, without the consent of the tribe. Cherokee Nation v. Kansas Ry. Co., 135 U.S. 641 (1890), which rejected the contention that land was held by the Cherokees as a sovereign nation. Some treaties provided that railroads should have rights-of-way upon payment of just compensation to the Indian tribes. Treaty of June 5, 1854, with the Miamis, Art. 10, 10 Stat. 1093. See Chapter 15, sec. 1B.

> "The Act of March 2, 1899, 30 Stat. 990, authorized any railroad company or telegraph and telephone company to take and condemn a right-of-way in or through any lands which have been or may hereafter be allotted in severalty, but have not been conveyed to the allottee with full power of alienation. The Act of February 28, 1902, sec. 23, 32 Stat. 43, discussed in Oklahoma K. & M. I. Ry. Co. v. Bowling, 249 Fed. 592 (C.C.A. 8, 1918), made this statute inapplicable to the Indian Territory and Oklahoma Territory."

The concept of tribal consent as a pre-condition to the grant of a right-of-way is the very antithesis of the exercise of the power of eminent domain. The 1948 Act cannot be construed in pari-materia with the 1899 Act. The subject matters are not even similar. The 1948 Act concerns itself with consensual "grants" of rights-of-

way freely negotiated at arms length (excepting, as we have seen, section 327 concerning acquisitions by department or agencies of the United States). By contrast, the 1899 Act authorizes the taking and condemnation of rights-of-way for railroads and other uses without consent.

Defendants rely on Plains Elec. Gen. & Tr. Co-op v. Pueblo of Laguna, 542 F.2d 1375 (10th Cir. 1976), which dealt with statutes solely applicable to the Pueblo Indians. We find the rationale of the case to be supportive of our conclusions. The court, there, first held that the Act of May 10, 1926, 44 Stat. 498, was repealed by the Act of April 21, 1928, 45 Stat. 422, 25 U.S.C. 322, and said: "The 1928 Act is so inconsistent with the

1926 Act that it must be held to repeal the 1926 Act under the principle of Posados v. National City Bank, supra." Neither of these statutes is involved in the present case and we have observed no irreconcilable inconsistency between the 1899 Act and the Indian Reorganization Act and the Indian Rights of Way Act of 1948.

The Pueblo of Laguna case then proceeded to discuss the 1948 Act and holds that it, too, together with the 1928 Act, repeals the 1926 Act because of a "very real antagonism" between the statutes. But it is beyond our understanding that a court can create an implied repeal in the face of direction Congressional declaration "nor shall any existing statutory authority empowering the Secretary of

the Interior to grant rights-of-way over Indian lands be repealed." The regulation, 25 C.F.R. 161.3(a), supra, if interpreted to require tribal consent to the exercise of a statutory power of eminent domain is an invalid regulation inasmuch as it is inconsistent with the statutes and beyond the power of the Secretary to promulgate.

Defendants also contend that the Court of Appeals in the earlier case, United States v. Southern Pacific Transporation Co. (supra), precluded plaintiff from relying on the 1899 Act. Not so. The court rejected plaintiff's reliance on the 1899 Act because the railroad had not complied with the requirements of the Act, "including the requirements that maps be filed and approved and that compen-

sation be paid to the Indians." (543 F.2d at 691). We read the court's discussion of the 1899 Act as impliedly recognizing that the Act is a grant in praesenti of a right-of-way (like the 1875 Act) provided that all the statutory conditions are fulfilled. The very purpose of the application for a right-of-way which is the subject matter of the present action is to comply fully with the conditions of the 1899 Act.

We hold that tribal pre-consent is not a condition precedent to consideration of plaintiff's application for a right-of-way under the Act of March 2, 1899, and that the Department of Interior should be required to process the application.

Accordingly,

IT HEREBY IS ORDERED:

1. The motion for summary judgment filed by the Secretary of Interior, and joined by Intervenor, is denied.

2. The motion for summary judgment filed by plaintiff is granted.

3. Within ten days plaintiff's counsel shall submit an appropriate form of summary judgment.

DATED July 25, 1980.

/s/ Bruce R. Thompson
UNITED STATES DISTRICT JUDGE

March 2, 1899.

CHAP. 374.-An Act To provide for the acquiring of rights of way by railroad companies through Indian reservations, Indian lands, and Indian allotments, and for other purposes.

General Right of way to railroads through Indian lands granted.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a right of way for a railway, telegraph and telephone line through any Indian reservation in any State or Territory, or through any lands held by an Indian tribe or nation in Indian Territory, or through any lands reserved for an Indian agency or for other purposes in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or

treaty, but which have not been conveyed to the allottee with full power of alienation, is hereby granted to any railroad company organized under the laws of the United States, or of any State or Territory, which shall comply with the provisions of this Act and such rules and regulations as may be prescribed thereunder: Provided,

Provisos.

Approval of Secretary of the Interior.

That no right of way shall be granted under this Act until the Secretary of the Interior is satisfied that the company applying has made said application in good faith and with intent and ability to construct said road, and in case objection to the granting of such right of way shall be made, said Secretary shall afford the parties so object-

Parallel rights of way.

ing a full opportunity to be heard: Provided further, That where a railroad has heretofore been constructed, or is in actual course of construction, no parallel right of way within ten miles on either side shall be granted by the Secretary of the Interior unless, in his opinion, public interest will be promoted thereby.

Width.

SEC. 2. That such right of way shall not exceed fifty feet in width on each side of the center line of the road, except where there are heavy cuts and fills, when it shall not exceed one hundred feet in width on each side of the road, and may include ground adjacent thereto for station buildings, depots, machine shops, side tracks, turn-outs, and water

Additional ground for stations, etc.

stations, not to exceed one hundred feet in width by a length of two thousand feet, and not more than one station to be located within any one continuous length of ten miles of road: Provided, That this section shall apply to all rights of of way heretofore granted to railroads in the Indian Territory where no provisions defining the width of the rights of way are set out in the Act granting the same.

Proviso.
Applicable to Indian Territory, etc.

Maps to be filed.

SEC. 3. That the line of route of said road may be surveyed and located through and across any of said lands at any time, upon permission therefor being obtained from the Secretary of the Interior; but before the grant of such right of way shall

become effective a map of the survey of the line or route of said road must be filed with and approved by the Secretary of the Interior, and the company must make payment to the Secretary of the Interior for the benefit of the tribe or nation, of full compensation for such right of way including all damage for improvements and adjacent lands, which compensation shall be determined and paid under the direction of the Secretary of the Interior in such manner as he may prescribe. Before any such railroad shall be constructed through any land, claim, or improvment, held by individual occupants or allottees in pursuance of any treaties or laws of the United States, compensation shall be made

Damages.

to such occupant or allottee for all property to be taken, or damage done, by reason of the construction of such railroad. In case of failure to make amicable settlement with any such occupant or allottee, such compensation shall be determined by the appraisement

Appraisal.

of three disinterested referees, to be appointed by the Secretary of the Interior, who, before entering upon the duties of their appointment, shall take and subscribe before competent authority an oath that they will faithfully and impartially discharge the duties of their appointment, which oath, duly certified, shall be returned with their award to the Secretary of the Interior. If the referees can not agree,

then any two of them are authorized to make the award. Either party being dissatisfied with the finding of the referees shall have the right within sixty days after the making of the award and notice of the same, to appeal, in case the land in question is in the Indian Territory, by original petition to the United States court in the Indian Territory sitting at the place nearest and most convenient to the property sought to be condemned; and if said land is situated in any State or Territory other than the Indian Territory, then to the United States district court for such State or Territory, where the case shall be tried de novo and the judgment for damages rendered

Appeal.

by the court shall be final and conclusive. When proceedings are commenced in court as aforesaid, the railroad company shall deposit the amount of the award made by the referees with the court to abide the judgment thereof, and then have the right to enter upon the property sought to be condemned and proceed with the construction of the railway. Each of the referees shall receive for his compensation the sum of four dollars per day while engaged in the hearing of any case submitted to them under this Act. Witnesses shall receive the fees usually allowed by courts within the district where such land is located. Costs, including compensation of the referees, shall be made part of the award or

Construction to commence on deposit of the award.

Fees, costs, etc.

judgment, and be paid by such railroad company.

Construction, -forfeiture.

SEC. 4. That if any such Company company shall fail to construct and put in operation one-tenth of its entire line in one year, or to complete its road within three years after the approval of its map of location by the Secretary of the Interior, the right of way hereby granted shall be deemed forfeited and abandoned ipso facto as to that portion of the road not then constructed and in operation:

Proviso -extension of time for completion.

Provided, That the Secretary may, when he deems proper, proper, extend, for a period not exceeding two years, the time for the completion of any road for which right of way has been granted and a part of which shall have been built.

Annual Rental.

SEC. 5. That where a railroad is constructed under the provisions of this Act through the Indian Territory there shall be paid by the railroad company to the Secretary of the Interior, for the benefit of the particular nation or tribe through whose lands the road may be located, such an annual charge as may be prescribed by the Secretary of the Interior, not less than fifteen dollars for each mile of road, the same to be paid so long as said land shall be owned and occupied by such nation or tribe, which payment shall be in addition to the compensation otherwise required herein. And within the Indian Territory upon any railroad constructed under the provisions of this Act the rates and charges for

Passenger and freight rates, Indian Territory.

passenger and freight service, if not otherwise prescribed by law, may be prescribed by the Secretary of the Interior from time to time, and the grants herein are made upon condition that the companies shall transport mails whenever required to do so by the Post Office Department.

Railroad rights on public lands. Vol.18,p.482.

SEC. 6. That the provisions of section two of the Act of March third eighteen hundred and seventy-five, entitled "An Act granting to railroads the right of way through the public lands of the United States", are hereby extended and made applicable to rights of way granted under this Act and to railroad companies obtaining such rights of way.

Regulations.

SEC. 7. That the Secretary of the Interior shall make all needful rules and regulations,

not inconsistent herewith, for the proper execution and carrying into effect of all the provisions of this Act.

Amendment.

SEC. 8. That Congress hereby reserves the right at any time to alter, amend, or repeal this Act, or any portion thereof.

Approved, March 2, 1899.

APPENDIX B

4. Amended Summary Judgment, entered 28 August 1980, by the United States District Court, District of Nevada.

FILED
AUGUST 28, 1980

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Plaintiff,

Civil No. R-78-0216 BRT

vs.

CECIL D. ANDRUS, et al.,

Defendants,

and

WALKER RIVER PAIUTE TRIBE OF NEVADA,

Defendant-Intervenor. /

AMENDED SUMMARY JUDGMENT

On motion of the United States, and good cause appearing,

IT HEREBY IS ORDERED that the Summary Judgment filed August 14, 1980 is hereby amended to provide as follows:

1. Cecil D. Andrus, the Secretary of the Interior, shall forthwith cause to be filed and processed the application and supporting documents heretofore tendered by Southern Pacific Transportation Company to the Western Nevada Agency on or about the 28th of April, 1977, with regard to a railroad right-of-way through tribal lands within the Walker River Reservation.

2. The filing and processing of said application shall be accomplished pursuant to the provisions of the Right-of-Way Statute of 1899 (Act of March 2, 1899, Ch. 374, 25 U.S.C. §§312-318). Said filing and processing shall not be conditioned upon the procurement of the consent of the Walker River Paiute Tribe of Nevada.

3. This action is remanded to the Secretary of the Interior for further action in accordance with this judgment and accompanying order.

DATED August 27, 1980.

/s/ Bruce R. Thompson
UNITED STATES DISTRICT JUDGE